In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 513

BURNHAM CHEMICAL COMPANY, a corporation,

Petitioner,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof

THURMAN ARNOLD
1200 Eighteenth Street N.W.
Washington 6, D. C.

STERLING CARR
1 Montgomery Street
San Francisco 4, California

Attorneys for Petitioner.

WALTON HAMILTON
1200 Eighteenth Street N.W.
Washington 6, D. C.

Of Counsel.

Subject Index

Table of Authorities Cited

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

BURNHAM CHEMICAL COMPANY, a corporation,

Petitioner,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Burnham Chemical Company, respectfully prays for a writ of certiorari to the United States Court of Appeals in and for the Ninth Circuit to review the decision and judgment of the said court in the above-entitled case dated October 27, 1948.

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner, Burnham Chemical Company (plaintiff below) prior to 1929 was in the business of mining, processing and marketing borax and borax products. The respondent, Borax Consolidated, Ltd., is incorporated under the laws of the United Kingdom. The respondents, Pacific Coast Borax Company, a Nevada corporation, and United States Borax Company, a West Virginia corporation, are wholly owned subsidiaries of Borax Consolidated, Ltd. The respondent, American Potash and Chemical Corporation, is a Delaware corporation which, during the period covered by this action, was owned and controlled by citizens of the Third Reich. The four companies, two parent and two subsidiaries of one of them, at all times concerned in this action, controlled the entire borax industry not only in the United States but over the world.

This is a suit for treble damages for violation of the antitrust laws of the United States. Allegations in the complaint, none of which is denied, set forth the following facts: Prior to 1929 the respondents engaged in a persistent campaign to liquidate petitioner as a competitor (a full account of which is set forth in the complaint). As a result of this conspiracy petitioner had to shut down its business on or about January 1929. Since that date petitioner has persistently attempted to get back into business but has been prevented by the unlawful acts of the respondents, which through concerted action have succeeded in preventing petitioner from getting access to necessary sources of raw material.

Petitioner has had good cause to believe that it was a victim of a conspiracy in violation of the antitrust laws.

For that reason, ever since it was put out of business in 1929, petitioner has, with the utmost diligence, attempted to discover evidence sufficient to frame a complaint against the respondents. Among other actions petitioner lodged a complaint with the Antitrust Division of the Department of Justice, which with all of its resources was not able to gather the materials essential to the formulation of an acceptable complaint.

The evidence on which this complaint is based was in fact not discovered until 1944, when the American Potash and Chemical Corporation was seized as enemy-owned, brought under the control of the Alien Property Custodian, and a master agreement between it and Borax Consolidated, Ltd., as well as a host of documents attesting the execution of the secret agreement and the acts through which it was made effective, were discovered in its files. In fact, these records laid bare the whole course of concerted action on the part of the two parent companies and their Subsidiaries to crush all independents and to assert a world dominion over the industry. Before the information in the files of American Potash and Chemical Corporation became available petitioner did not have information about the conspiracy or concrete knowledge sufficient for an appeal to the courts.

Until this discovery respondents had kept this illegal agreement and their previous arrangements for concerted action a closely guarded secret. They held themselves out to their competitors to be independent competing corporations. Officials of respondents on inquiry by petitioner denied the existence of any conspiracy and asserted that the market for borax and borax products was free and open.

As a consequence of these disclosures two suits, one civil and one criminal, were filed against respondents and others by the United States. As a result of these suits the illegal agreement and conspiracy became a matter of public record and petitioner, which was still pursuing its investigation, discovered it for the first time. Immediately after the discovery petitioner proceeded with the utmost diligence and brought the present suit.

The Issue of the Statute of Limitations

Respondents in the courts below did not deny the allegations of the complaint. They did file "special answers" with respect to three paragraphs of the complaint which even if eliminated would still leave the cause of action intact. Instead, respondents moved to dismiss the action on the ground that it was barred by the statute of limitations of the state of California. A separate trial on the issue of the statute of limitations was had. At the pretrial conference, over the objection of petitioner, the judge ruled that the issue was whether at any time from May 17, 1929 to October 10, 1939 petitioner "knew or had good cause to believe" that it had been damaged by reason of any action of the respondents in violation of the antitrust laws (R. p. 195). The case was sent to a jury on this issue. Mr. Burnham, the principal witness for petitioner, admitted that he had good reason to believe that he had been injured by the illegal acts of respondents. He testified, however, that he knew nothing of the conspiracy set out in "the 1929 agreement" until the United States filed its suits in 1944. His uncontradicted testimony shows that certain of their officials in 1928 denied that there was

any concert of action among the respondents. He further testified that until 1944 petitioner did not possess any specific and detailed facts which would have enabled it to have drawn an adequate complaint against the respondents (R. pp. 356, 690).

Respondents put on no testimony and the trial court directed a verdict for the respondents on the ground that petitioner had good cause to believe as early as 1929 that it was being damaged by the respondents in violation of the antitrust laws.

The Decision in the Court of Appeals

The Court of Appeals affirmed the directed verdict entered by the trial court, holding (1) that the cause of action accrued in 1929, which was the last date on which damage was held to be shown; (2) that the action of the respondents' officers in falsely denying the conspiracy was not fraud or fraudulent concealment under the California cases; and (3) that petitioner as early as 1929 had good cause to believe that it had been driven out of business by acts of respondents in violation of the antitrust laws. The court below read the California statute of limitations* as an integral part of the antitrust laws; held that such statute applied to the instant case as a matter of law; and ruled that the petitioner was barred from a recovery of the damage it had sustained by reason of a violation of the antitrust laws.

II. THE SILENCE OF THE COURT BELOW

The decision of the court below does not discuss two issues which were fully presented to it and which we be-

*C.C.P. 338(1), ignoring C.C.P. 338(4).

lieve are fundamental to the decision of this case. In the first place we assert that the policy of the antitrust law is frustrated if a group of great corporate defendants operating a nationwide conspiracy may cloak themselves with the appearance of competing with each other as independents and at the same time by secret arrangements destroy their real competitors—provided that their secret conspiracy can be successfully concealed during the period covered by the state statutes. It is a matter of common knowledge, testified to by Section 5 of the Clayton Act, that the small competitor is nearly always, as is the case here, in no position to uncover evidence sufficient to formulate an acceptable complaint. It is likewise a matter of common knowledge that vast combinations have the actual power to prevent for long periods of time the discovery of their illegal activities. The issue, therefore, is whether the very purpose of the antitrust laws in making provision for private actions for damages is not perverted or even destroyed if such actions are to be barred by the success of corporate defendants in concealing the evidence of their conspiracies. That issue is not considered or discussed by the court below.

In the second place, the court below, despite the vigorous presentation of the question, did not discuss the question of whether a state statute of limitations must be rigidly followed, even though the result of its application is to defeat the purpose for which the act exists.

III. BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under Section 347, 28 U.S.C.A. (Judicial Code, Section 240, as

amended), petitioner having been denied a right specifically set up and claimed under a Federal statute, namely Section 4 of the Clayton Act (15 U.S.C.A. § 15) granting to a person standing to sue because of damage to his business and property by reason of violation of sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2).

IV. THE QUESTIONS PRESENTED

The broad questions presented by this petition are two in number. The first is whether the purpose and policy of the Sherman Act is to place those who violate the law in the position where they may profit, even to the extent of imposing a world-wide dominion over an industry, by successful concealment of a secret conspiracy, and the actions giving it effect, through which they rid themselves of the competition of the independents in the industry.

The second is whether the public policy inherent in the antitrust acts is to be thwarted or defeated by a rigid and literal application of state statutes of limitation.

These broad questions break down into narrower questions, which may be stated as follows:

1. Does the ruling in the case of *Holmberg v. Ambrecht*, 327 U.S. 392, apply only to suits which historically are brought in equity courts, or does it, as set forth in *Bailey v. Glover*, 21 Wall. 342, apply as well to suits which historically are classified as actions at law?

2. May the policy of the Sherman Act be frustrated by a state rule of limitation of action which puts a premium on the successful concealment of secret conspiracies in restraint of trade entered into by combinations of companies which hold themselves out to be independent and proclaim themselves to be competitors?

In addition, the Circuit Court held that in a treble damage action, such as the present, the statute of limitations begins to run as each overt act is performed and not from the date of the last of such overt acts as previously held by this court to be the law.

The Circuit Court held (R. p. 849 (b), also p. 853):

> "(b) a cause of action for damages for violation of the antitrust laws *accrues when the damage is sustained* and the statute of limitations begins to run at that time;"
>
> * * * * * * *
>
> "We hold that this is an action at law for damages under Federal antitrust laws and the *only damages for which a recovery might be had are those which accrued and were suffered within three years prior to the filing of the complaint* and the record reveals that none were shown during this period. The court therefore properly held the cause barred by Section 338 (1) of the California Statute of Limitations."

Such holdings are contrary to the rule laid down by this court.

In *Fiswick v. United States*, 329 U.S. 211; 67 S. Ct. 224 (p. 216 of the Official Report) it is held:

> "The statute of limitations, unless suspended, *runs from the last overt act during the existence of the conspiracy. Brown v. Elliott*, 225 U.S. 392, 401, 32 S. Ct. 812, 815, 56 L. Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy."

In *Brown v. Elliott*, supra, at page 815, this court has stated:

"And where, during the existence of the conspiracy there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.*" (Citing cases).

V. REASONS FOR GRANTING THE WRIT

As a practical matter we are persuaded that no greater encouragement can be given to the formation of conspiracies in restraint of trade than the holding of the court that the state statute—irrespective of the diligence of the plaintiff and of the fraudulent concealment of the defendants—is to be literally applied. For such a rule throws a cloak of immunity around law-breakers who for the period of the statute can conceal the evidence of their wrong-doing. The legislative history of the Sherman Act makes it clear that suits for treble damages were instituted by Congress, not to give individuals windfalls, but rather to provide a supplementary instrument of law enforcement. They are not in the category of the collection of ordinary debts. That this is true is demonstrated by the right of individuals to resort to findings in government prosecutions as *prima facie* evidence in their private suits. The ruling of the court below puts a severe and drastic limitation on private suits as a practical means of enforcement. It leaves the matter of how effectively the antitrust acts are to be enforced through private actions to the legislatures of forty-eight states. We cannot conceive that the Congress desired to have this private means of enforcement of the Sherman Act shackled by the

literal application of the multiple laws of the several states of the Union.

In any event, we are convinced that this question is one which is of tremendous importance in antitrust enforcement and that, amid the current confusion in holdings, some guidance in the employment of state statutes in federal antitrust actions should be given by this court.

These questions involve issues of federal law of paramount importance. Although in cases in bankruptcy, *e.g.*, *Bailey v. Glover,* 21 Wall. 342, and *Holmberg v. Ambrecht,* 327 U.S. 392, this court has spoken out plainly, it has never applied the doctrine of these cases within the field of antitrust law.

Such an application has, however, been made of the *Bailey v. Glover* doctrine by the Fifth Circuit. *American Tobacco Company v. People's Tobacco Company,* 204 Fed. 58, and its decision is directly contrary to that of the court below in the instant case. In that case the plaintiff had been injured in its property and business by a secret conspiracy of the two defendants and another. It was some time after it was driven from business that the plaintiff made discovery of the conspiracy. In this case the court held that the plaintiff had been guilty of no laches, since he filed suit within a few months of discovery. It also held that the successful concealment of the "concerted action" from the plaintiff was a "fraud" on the part of the defendants and that for that reason, they were not entitled to interpose as a defense the plea of the statute of limitations.

We cannot believe that the accidental consideration of whether a suit is at law or in equity is the controlling

reason lying back of the *Holmberg* and *Bailey* decisions. In fact, to the contrary, in the *Bailey* case Mr. Justice Miller recites in detail the rationale of the statute of limitation, sets down in specific terms the limits of its use, and holds that where the wrong-doing is concealed or "the fraud is committed in such a manner as to conceal itself" the plea is not to be allowed. And he insists that "we see no reason why the principle should not be as applicable to suits tried on the common law side of the court's calendar as to those on the equity side."

Nor can we believe that the now outmoded distinction between law and equity has any utility either as a matter of justice or in carrying out the purpose of Congress in enforcing a federal right where it has decreed no statute of limitations exists.

In addition to the above considerations we believe that the application of state statutes to federal rights generally is left in confusion by the decision of the court below. As the opinion reads the whole question of whether a state statute shall be literally and rigidly applied or whether equitable considerations and matters involving the purpose of the federal act should be considered depends on whether historically the case can be classified as one in law or equity. The case of *Holmberg v. Ambrecht* lays down a liberal rule with respect to the application of a state statute to the enforcement of federal right. It happened to be a case in equity.

We are convinced that the above questions are of nationwide importance and that clarification of these issues by this court is urgently needed.

CONCLUSION

For the reasons recited above, the petitioner asks this court for a writ of certiorari in the instant case.

Respectfully submitted,

THURMAN ARNOLD
STERLING CARR
Attorneys for Petitioner.

WALTON HAMILTON
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

BURNHAM CHEMICAL COMPANY, a corporation,

Petitioner,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION,

Respondents.

Brief in Support of Petition for Certiorari

INTRODUCTION

In this petition, a conscientious attempt has been made to limit the questions presented to those of utmost importance. A reading of the opinion of the court below, for which no summary can be a substitute, will make it clear that the case bristles with issues. Aside from the holding that the case of *Holmberg v. Ambrecht* sounds in equity, and therefore is inapplicable to a private antitrust suit, the court is content to foreclose the major issues presented above, without formally entertaining them. In fact, its

opinion moves rather consistently upon the level of secondary questions. A number of these secondary questions, such as the holding that the suit for triple damages is a private action quite unaffected with a public interest; the isolation of the acts through which it is given effect from the conspiracy in which it is set; the failure to recognize that, in a suit concerned with federally established rights, the choice between state statutes is a federal, not a state matter; the ruling that the statute of limitations cannot be tolled for "fraudulent concealment," because fraud is not "the gravamen" of an antitrust suit; the ruling that in a treble damage action such as the present the statute of limitations begins to run from the performance of each overt act rather than from the last overt act as previously held by this court to be the law; and the neglect to make the allegations in the complaint the frame of reference for any judgment upon the statute of limitations;—all these reflect "ninth circuit law" or run against the weight of authority and, in our opinion, in themselves demand a review of the instant case by this Court. But in the attempt to claim the attention of the court only for issues of greatest consequence, all such secondary questions, as well as the many irregularities which may be noted in the procedure of the trial court, are passed over. In this petition, the Court's attention is directed only to important questions of public policy in the operation of the national economy.

As so limited, the issue in this case is simple and clean-cut. Is a private action, asserting a federal right based upon the antitrust laws to be defeated by a literal application of a state statute of limitation? The court below held,

in effect, that the statute of limitations began to run when the petitioner knew or had good cause to believe that it had been injured by the unlawful conduct of the respondents, and not from the time when the petitioner discovered, or, with due diligence, could have discovered the secret agreement between respondents, which had been successfully concealed for years, and in the execution of which it had been injured in its business and property. The holding is in effect that petitioner had proper access to the courts at a time when it did not possess and could not have possessed, knowledge adequate to framing an acceptable complaint and that when at last it made prompt use of discovery just made, access to the courts was barred. It is, in the alternative, contended by petitioner that the statute of limitations begins to run with discovery or that the respondents because of their fraudulent concealment of the conspiracy and the conduct through which it was executed are not entitled to the plea. To allow the pleas, as the court below has done, allows the wrongdoers to convert a statute designed to give them lawful protection against an untimely suit into an immunity to the law.

I.

IN SUITS SEEKING TO VINDICATE RIGHTS ESTABLISHED BY FEDERAL LAW, THE FUNCTION OF THE STATE STATUTE OF LIMITATIONS IS INSTRUMENTAL. IT SHOULD BY THE COURTS BE SO APPLIED AS TO REALIZE, NOT TO DEFEAT, THE OBJECTIVES OF THE ACT OF CONGRESS INVOKED.

A. State Statutes of Limitation Were Not Intended for or Shaped to Use in Antitrust Cases.

This is not a diversity case, where the issue concerns a state-created right, and under the rule of *Guaranty Trust*

Co. v. York, 326 U.S. 99, the federal courts are under obligation to follow the state decisions. Instead it is an action grounded on federal law, and seeking to vindicate a federal right.

The antitrust laws contain no statute of limitations either in express language or by implication. In the silence of the Congress "the limitations of time for commencing actions under national legislation" has been left to judicial implications. As to actions of law the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitations. *Holmberg v. Ambrecht,* 66 S. Ct. 582, 584. Thus it is implied that state statutes of limitations are to be absorbed "within the interstices of the federal enactments." It is thus only by implication that state statutes of limitations are brought into play.

These state statutes do not well serve the purposes of federal legislation. In the usual state statute causes of action are resolved into a number of categories and a period of time within which action must be started is fixed for each of these categories. The categories have been framed by state legislatures with local laws primarily in mind. Almost none of them make any provision for antitrust, or, for that matter, for any action grounded in federal rights. In many cases, an antitrust action fits neatly into none of these categories and can usually be made to fit into more than one. To use the state statute rigidly is to employ an instrument never intended for, and no wise adapted to, its federal purpose.

The statutes of limitations of the several states are quite diverse. This diversity has been increased through

their interpretation by the courts of the United States. In their variety they play with equality in respect to the rights established by the federal antitrust laws. In West Virginia, for example, the thinnest sort of a line separates the one-year from the five-year rule. *Momond v. Universal Film Exchange,* 43 F. Supp. 996. In Tennessee, the court had an almost arbitrary choice between statutes running for one, for three and for ten years; and its choice of the ten-year statute for an antitrust action was, by Mr. Justice Holmes, approved by this Court. *Chattanooga Foundry and Pipe Co. v. City of Atlanta,* 203 U.S. 390. Thus, left to the caprices of state statutes as interpreted, the period within which antitrust suits must be brought vary widely not only from state to state but even within the same state. In the application of such statutes to cases involving the federal antitrust laws, there is not only lack of uniformity but confusion as well.

B. State Statutes of Limitations Must Be Flexibly Adapted to the Administration of the Antitrust Acts.

The antitrust laws embody our dominant public policy for the national economy. It has by the courts been elevated above ordinary statutes and by Mr. Chief Justice Hughes, in the case of *Appalachian Coal v. U. S.,* 288 U.S. 344, has been called a charter of economic freedom. The several statutes of limitations are mere instruments intended to make effective the objectives of the law. The antitrust acts and the statutes of limitations lie on quite distinct planes. The first is federal, the second is state. The first sets down ends. The second sets down mere means. The statute of limitations, never enacted by Congress but borrowed from state law by the courts as an aid

to administration, must not be allowed to defeat the purpose for which it was invoked.

The statute of limitations must be appraised in terms of its instrumental purpose. It is intended to prevent a plaintiff from sleeping on his rights and to give to him an incentive to diligence. It is intended to insure fairness to the defendant by seeing to it that any complaint against him is brought within a reasonable time. It is intended to insure justice by securing a trial while memories are fresh, the facts are in hand and documents are available. Such is its rationale; and by its rationale must its use, especially when carried out of its own domain into federal law, be guided.

In federal cases the state statute of limitations may be justly and properly applied when the plaintiff willfully delays his suit or fails in diligence in pressing it. But the plaintiff who has been sensitive to his injury, and diligent in his search for the source of his wrongs should not be stripped of his rights because discovery is not made in the prescribed period. And the defendants should be denied the plea who have prevented discovery by successfully concealing the secret conspiracy in which they have been engaged. If a conspiracy in restraint of trade is illegal, surely a conspiracy to conceal the conspiracy and thus to render it immune to the law is illegal. For otherwise the antitrust laws are revised to read that acts in violation remain legal so long as they are successfully concealed. See *Bailey v. Glover*, 21 Wallace 342.

Testimony to the instrumental character of the statute of limitations is given by Section 5 of the Clayton Act (15 U.S.C.A. §16). This section serves three distinct pur-

poses. *First*, it recognizes that when a small business concern is up against a conspiracy of large corporations the gathering of the material essential to a successful complaint is beyond its reach and resources. It then points to the government as an agency of discovery. *Second*, it decrees that evidence presented by the government in an action instituted by it shall be prima facie in a private suit covering the same matters. And *third*, it suspends the running of whatever statutes of limitations there may be while the government has a case in the courts. The meaning of all this, as a commentary upon the use of statutes in federal antitrust suits is unmistakable.

It is submitted that the court below was guilty of grievous error in overlooking its instrumental character and in reading the statute of limitations as if it were an integral part of the antitrust laws.

II.

IN THE CIRCUMSTANCES OF THE INSTANT CASE, THE LAW OF THE LAND COMPELS THE REJECTION OF ANY PLEA BASED UPON THE STATE STATUTE OF LIMITATIONS.

In its validation of the plea of the state statute of limitations, the court below attempts to divest the illegal conduct of defendants of fraud and fraudulent concealment. To that end, pushing the ninth circuit case of *Foster and Kleiser v. Special Site Sign Co.*, 85 F.(2d) 742, beyond its holding, it argues that fraud is not the gravamen of an antitrust offense. The contentions run counter to elementary law. The private antitrust suit is a suit for a wrong. The conspiracy which the statutes outlaw is a conspiracy to commit a wrong; and a conspiracy in restraint of trade takes its legal quality from the char-

acter of the wrong done. A business tort, such as that set forth in the complaint, is touched off by the pursuit of gain. It may or may not involve personal malice; it is prompted by what Mr. Justice Holmes refers to as "disinterested malevolence." *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350. The wrong done, involving deceit, slander of person or of goods, trespass upon business or property, predatory competition, or fraud, fall into one or another of the categories of tort law. A veritable catalogue of offenses involving competitive practices have in Federal Trade Commission proceedings been characterized as "fraud." The suits at law involving abuses of the use of the mails are equally replete with acts of conduct, condemned as "fraud." Yet the frauds revealed there are petty in comparison with the secret conspiracy of Borax Consolidated and American Potash and Chemical to hold themselves out as independents, the while pushing forward their program to drive all their small competitors from the field. The respondents made out of the marketing of borax a crooked game while pretending to be honest concerns operating according to the law. The offenses alleged against them in the complaint, if true, put them at the very top of the hierarchy of frauds.

1. In Direct Opposition to the Holding Below, the Equitable Rule of Holmberg v. Ambrecht, 327 U.S. 392, Compels the Rejection of the Plea of the Statute of Limitations.

Holmberg v. Ambrecht—rejected by the court below, because as a doctrine of equity it has no place in an action at law—is the leading case on the subject. It is a crystallization of a legal doctrine which for decades has

been in the making. In it, for an all but unanimous court, Mr. Justice Frankfurter considers the problems presented in cases which seek to vindicate federal-established rights and the relevant Acts of Congress contain no statute of limitation. He points out that in the silence of Congress state law has been drawn upon to fill in the interstices; insists that "it would be incongruous to confine a federal right within the bare terms of a state statute of limitations;" and insists that "federal courts, sitting as national courts throughout the country" should "apply their own principles in enforcing an equitable right created by Congress." The opinion in specific terms, holds that, when a plaintiff has not slept on his rights the statute of limitations should not begin to run until the fraud is discovered.

The instant case and the *Holmberg* case are much alike; and they present the same issue in respect to the use of the state statute of limitations in cases seeking to vindicate rights granted by Congress. The two cases are alike suits for money damages. In each there has been the successful concealment of fraud, delaying the framing and filing of the complaint. The difference is that, whereas in the *Holmberg* case, the fraud and the concealment thereof is proved, in the instant case it is, through failure to deny the allegations, admitted. The *Holmberg* case is technically in equity because its concern is with bankruptcy; but, had a prayer for an injunction been added, the instant case could have been made to sound in equity. If in the *Holmberg* case, the plea of the statute of limitations is rejected, while in the instant case it is accepted, so substantial a difference in the administration of justice ought not to

depend upon so irrelevant a standard as the historical name by which the cause of action is called. It is to the point that the rationale which supports the *Holmberg* decision applies without qualification to the instant case. If there is a difference, the rule ought to apply *a fortiori* in the instant case; for, whereas in a bankruptcy proceeding, it is only the group of creditors, large or small, which is injured, the very purpose of the suit for triple damage is to vindicate the right not only of the private suitor but of the general public as well.

2. In Direct Opposition to the Holding Below, the Classic Case of Bailey v. Glover, 21 Wall. 342, holds That, in Cases Where the Fraud Is Committed in Such a Manner as to Conceal Itself, the Doctrine That the Statute Begins to Run from the Time of the Discovery Is Held to Be as Applicable at Law as in Equity.

Bailey v. Glover—completely ignored by the court below—is a statement that, in cases concerned with federal rights, its function must govern the use of the state statute of limitations. Mr. Justice Miller, speaking for a unanimous court, finds the limits of the employment of statute of limitations in the rationale which sustains it. "They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights had never existed, or had been satisfied, transferred or extinguished." But, as he insists, "to hold that by concealing a fraud, or by committing a fraud in such a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to

prevent fraud the means by which it is made successful." In a word it does not make sense to insist that a statute designed to insure trial before the evidence is destroyed should be held to bar a trial at a time when at last the evidence is for the first time available.

The rationale set down by Mr. Justice Miller is in no sense dependent upon whether the action falls into the historical category called equity or that called law. In fact he and this Court are of opinion that "the weight of judicial authority, both in this country and in England is in favor of the application of the rule to suits at law as well as in equity." Here it is of note that *Bailey v. Glover* is cited three times in the *Holmberg* decision.

3. In Direct Opposition to the Court Below, the Case of American Tobacco Company v. Peoples Tobacco Company, 204 F. 58, Directly Applies the Rule of Bailey v. Glover to a Private Suit Seeking to Vindicate a Right Established by Federal Antitrust Law.

American Tobacco Company v. Peoples Tobacco Company—also ignored in the opinion below, in spite of the repeated urging by petitioner—presents a situation almost identical with that in the instant case. Although plaintiff had good cause to believe that it had been injured by the defendants, it did not discover the conspiracy until after the statute of limitations had run against it. The court pointed out that "the course of the wrongful conduct" of the defendants "was at all times concealed from the plaintiff" and that "this conduct and this concealment must necessarily be considered as a fraud on the plaintiff." It was "the lack of a knowledge of the facts" which delayed the action; and, following *Bailey v.*

Glover, the court held that the statute of limitations was tolled until discovery.

The three cases are compelling in their authority. The *Holmberg* case sets the principle down as a rule of equity; *Bailey v. Glover* shows that it is equally applicable to suits at law and in equity; and the *Peoples Tobacco* decision gives reality to the doctrine in the field of private antitrust. All three recognize the instrumental character of the state statute when applied in cases which seek to vindicate federal-established right. And all three are in direct conflict with the holding in the instant case of the court below. It makes no practical difference whether the defendants are denied the plea of the statute of limitations, or whether it is held that the statute begins to run from discovery. But it is of importance that by the successful concealment of a secret conspiracy, the respondents should not be allowed to convert a statute designed for their lawful protection into an immunity to the antitrust laws.

CONCLUSION

It is submitted that the questions presented here are of national importance; that they present a conflict of authority between the judgment of the court below and decisions of this Court and of the Fifth Circuit; that the issues here raised fall squarely within the "pastoral" or supervisory office of this Court; and that the interests of the lower courts, of litigants, and of the public, demand that they be given authoritative answers. For these reasons, petitioner prays this Honorable Court for a writ of certiorari to the Court of Appeals for the Ninth Circuit in the instant case.

Respectfully yours,

THURMAN ARNOLD
STERLING CARR
Attorneys for Petitioners.

WALTON HAMILTON
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 513.

BURNHAM CHEMICAL COMPANY, a corporation, *Petitioner*,

v.

BORAX CONSOLIDATED LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH AND CHEMICAL CORPORATION, *Respondents*.

MEMORANDUM IN ANSWER TO BRIEFS FOR RESPONDENTS BORAX CONSOLIDATED, LTD., ET AL., AND AMERICAN POTASH AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THURMAN ARNOLD,
1200 Eighteenth Street, N. W.,
Washington, D. C.

STERLING CARR,
1 Montgomery Street,
San Francisco, California,
Attorneys for Petitioner.

WALTON HAMILTON,
1200 Eighteenth Street, N. W.,
Washington, D. C.,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CONTENTS